Today's ***Order*** is disappointing because while there is bipartisan agreement that the current video franchising framework should be refined to better reflect marketplace realities, technological advancement, and consumer demands, the decision skips the fine-tuning and performs an extreme makeover. The majority accomplishes today what the elected representatives of the American people have tried to do through the legislative process. In doing so, the Commission not only disregards current law and exceeds its authority, but it also usurps congressional prerogatives and ignores the plain meaning of Title VI, the cannons **of** statutory construction, and the judicial remedy Congress already provided for unreasonable refusals. In crafting a broadly aggressive and legally tenuous solution, the majority attempts the legal equivalent of triple axels and quadruple toe loops that would only impress an Olympic judge who is willing to overlook slips, stumbles, and falls.

We might keep in mind former President Ronald Reagan's views on federalism and the role of local governments. In his first State of the Union Address, President Reagan exhorted Americans to give power back to local governments:

> Together, after 50 years of taking power away from the hands **of** the people in their states and local communities we have started returning power and resources to them. **...** Some will also say our states and local communities are not up to the challenge of a new and creative partnership. Well, that might have been true **20** years ago. **...** It's no longer true today. This Administration has faith in state and local governments and the constitutional balance envisioned by the Founding Fathers.'

More recently, President George W. Bush echoed this trust in local government, asserting that "government closest to the people is more responsive and accountable."' While the Commission has long viewed the cable franchising process **as** "a deliberately structured dualism,'" today's decision is a clear rebuke of this storied relationship with local government.

Congressional action in **1984, 1992,** and **1996** re-affirmed further that it is Congress' intent that "the franchise process take[s] place at the local level where city officials have the best understanding of local communities' needs and can require cable operators to tailor the cable system to meet those needs."[7] This is clearly set forth in the purposes of Title 6, wherein Congress made clear that Title **6** would establish the proper local, state and federal roles! Congress established a framework whereby state and local authorities, within certain federal limits, are primarily responsible ***for*** the administration of the franchising process. That process is inherently local and fact-specific. Indeed, a one-size-fits-all

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complex and time consuming than it ***should be,"*** (Order, **¶ 3),** the proper **inquiry** is whether the franchising process is operating ***as Congress intended.*** Today's ***Order*** ignores this important question. In so doing, the Commission disregards the parameters established in the Cable Act and imposes its view of how the franchising process ***should be.***

[4] President Ronald Reagan, ***State of the Union Address,*** **January** 26, **1982,** available at, http://www.reagan.utexas.edu/archives/speeches/1982/12682c.htm.

[5] George W. Bush, "What the Congress Can Do For America," WALL ST. J., **January 3,2007,** at A13.

[6] ***Cable Television Report and Order,*** **36** F.C.C. 2d 143,207 **¶177,** ***recon.,*** **36** F.C.C. 2d **326 (1972).**

[7] H.R. Rep. No. **934, 98th Congress, 2d Sess.** at **24.**

[8] **47** U.S.C. § **521** (3).

approach is antithetical to clear congressional intent that cable systems be "responsive to needs and interests of local community."[9]

To be sure, the franchising process is not perfect and, by definition, negotiations may result in some delay. But Congress, after much deliberation, created this process to achieve certain stated policy objectives, which are clearly set out in the Act.[10] Regardless of how commenters now feel about this carefully calibrated and negotiated balance, Congress delegated authority to state and local governments to make certain decisions and to determine the merit of granting cable franchises in their respective communities. It then set forth a judicial remedy if a party is aggrieved by a denial of franchising." While Congress has the power to revisit this scheme, and has strongly considered doing so, until then this Commission must adhere to the law as written.

Yet today, the Commission is federalizing the franchising process, taking it upon itself to decide, in every local dispute, what is "unreasonable," without actually looking at specific, local examples to determine the real situation.[12] Instead of acknowledging the vast dispute in the record as to whether there are actually any unreasonable refusals being made today, the majority simply accepts in every case that the phone companies are right and the local governments are wrong, all without bothering to examine the facts behind these competing claims, **or** conduct any independent fact-finding. This is breathtaking in its disrespect of our local and state government partners and in its utter disregard for agency action based on a sound record.

Today's ***Order*** also displays a fundamental misunderstanding about the commitment of franchising authorities to bring competition to their citizens. By law, a franchise under Title ***6*** confers a right of access to people's **property**.[13] Unlike members of this Commission, many state and local officials are elected and directly accountable to their citizens. **Our** knee-jerk embrace of everything interested companies say while discounting local elected officials on a matter grounded in local property rights certainly does not inspire a great deal of confidence in the Commission's ability on the federal level to arbitrate every local dispute in the country and fairly decide who is unreasonable and who is not. Even if the Commission had such power, there is no mechanism outlined in this ***Order*** to establish bow that process would work. Consequently, the end result will likely be litigation, confusion, abuse of the process, and a certain amount of chaos. It is sadly ironic that this agency, which has been recently in violation of one of its own 90 day statutory deadlines, is telling localities to do as I say, not as I do.“

[9] 47 U.S.C. § 521(2).

[10] One of the principal purposes of Title **VI** is to "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2).

[11] 47 U.S.C. § 555.

[12] See Letter from David L. Smith, City Attorney, City of Tampa, to Kevin Martin, Chairman, FCC, dated January **5**, 2007 (stating "[h]ow disappointing it was to learn that ... the FCC would embrace as truth an allegation in a rulemaking that has such far-reaching implications to so many, without doing any follow-up with the jurisdiction named to confirm it accuracy.").

[13] *See* 47 U.S.C. § 541 **(a)(2)**.

[14] See, e.g., In the Matter of Comcast Corporation's Request for Waiver of 47 C.F.R. **§ 76.120(a)(1)**, CSR-7017-2, CS Docket No 97-80, DA-06-2543, CS Docket No 97-80, filed 4/19/06 (waiver proceeding placed on public notice 5/17/06 and decided 1/10/2007, well past the statutory "shot clock"); 47 U.S.C. § 549(c) ("the Commission shall grant any such waiver request within 90 days of any application filed under this subsection.").

Over the past two years, Congress held nearly two dozen hearings on franchising, and sought to amend the Cable Act in an effort to reform the current franchising process and "strike the right balance between national standards and local oversight."[15] Yet, the Commission has finalized in the dark of night what Congress was unable to resolve in two years of intensive public deliberations. In contrast to the Senate where I used to work, one might call the FCC the world's least deliberative body. And the final product shows it.

Congress would not have expended effort on a major piece of legislation had its members believed it was not necessary to grant the Commission explicit authority to do what the majority now contends the Commission can do under existing law. The House bill proposed a national cable franchising regime, while the Senate bill proposed an expedited competitive franchise process which would have required local authorities to issue franchises pursuant to a standard application drafted by the Commission. Today's ***Order*** turns federalism on its head by putting the Commission in the role of sole arbiter of what is a "reasonable" or "unreasonable" LFA practice and short-circuiting the franchising process if an arbitrary shot clock has expired.

While Congress worked to change federal law to create a role for the Commission in the franchising process, there was and continues to be considerable state and local activity to reform the local franchising process. To date, nearly half of all states have adopted state-wide franchise reform or mandatory state franchise terms, or have engaged in a democratic process to enact meaningful franchise reform legislation.[16] Hundreds of other localities have approved new franchises, and many more are in the works.

When we launched this proceeding, the central question was "whether the local franchising process truly is a hindrance to the deployment of alternative video networks, as some new entrants assert[ed]."[17] Indeed, the *Local Franchising NPRM* explicitly solicited "empirical data" and "concrete examples" regarding problems in the franchising process that FCC could resolve. In response, the record evidence provides scant, dated, isolated, and unverified examples that fall far short of demonstrating a systematic failure of state and local governments to negotiate in good faith and in a reasonable fashion.

According to the Telecommunications Industry Association, "some recent examples of overly-burdensome, and ... 'unreasonable,' extraneous obligations"[18] included (1) Merton Group's two year negotiations with Hanover, New Hampshire, which concluded in December, 2004; (2) Knology's negotiations with Louisville, Kentucky in early 2000; (3) Knology's franchise negotiations with the greater Nashville, Tennessee area in March 2000; and (4) Grande Communication's negotiations with San Antonio and Corpus Christi, Texas in 2002. Additionally, Fiber-To-The-Home Council cites the efforts of Guadalupe Valley Telephone Cooperative to seek a franchise in the City of Bulverde, Texas in 2004. The Order itself relies on unconfirmed allegations by Verizon and AT&T about unreasonable demands and negotiations being drawn out over an extended period of time; and complaints by U.S. Telecom

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[15] H.R. REP. No. 109-470, at 3 (2006).

[16] While the ***Order*** purportedly refrains from explicitly preempting "statewide franchising decisions" and only addresses "decisions made by [instrumentalities of the state, such as] county – or municipal level franchising authorities," this dubious distinction has a questionable legal basis. Under Title 6, LFAs derive their power by virtue of state law, so such distinctions are not for the FCC to make. Moreover, the Commission's contention that it does not have sufficient information in the record to consider the effect of franchising by states (some of which have had laws in place for a decade), but has sufficient record evidence to preempt 33,000 LFAs, is facially preposterous.

[17] Adelstein Statement, *Local **Franchising** NPRM*.

[18] Letter from Grant Seiffert, to Jonathan S. Adelstein, Commissioner, FCC, MB Docket No. 05-311 (dated December 11,2006).

Association, Qwest, and Bell South about new entrants accepting franchise terms that they considered unreasonable in order to avoid further delay in obtaining the franchise, or, in one case, filing a "friendly lawsuit."

These examples, based on my review of the record evidence, represent the extent to which competitive video providers argue that **LFAs** are delaying in acting on franchise applications. However, considering the current franchising process has been in place nearly **15** years and there are over 30,000 LFAs, I find these sporadic examples, individually and collectively, wholly insufficient to justify the Commission's quasi-legislative attempt to federalize the local franchising process. These sparse allegations and anecdotal evidence do not rise to a level that warrants today's drastic, substantive measures. The Commission's blind acceptance of a few alleged instances as illustrative of a much broader problem is a poor and unfortunate reflection of the disregard for proper agency process. The Commission neither attempted to conduct any independent fact-finding or due diligence, nor verify the allegations made **by** parties who have a vested interest in the outcome of this proceeding." Even more shocking, the Commission and the commenters fail to cite to a single actual, present day problem pending with any specific LFA.[20]

Notwithstanding the scant record evidence to justify agency preemption and the creation of a national, unified franchising process in contravention of federal law, the Commission conjures its authority to reinterpret and, in certain respects, rewrite section 621 and Title VI of the Communications Acf on just *two* words in section 621(a)(1)[21] – "unreasonably refuse." The Commission ignores the verb that follows: "to award." A plain reading section 621(a)(1) does not provide a wholesale "unreasonable" test for all LFA action. Rather, the statutory language focuses on the act of awarding a franchise. While I agree that the Commission has authority to interpret and implement the Communications Act, including Title VI,[22] the Commission does not have authority to ignore the plain meaning, structure and legislative history of section 621, and judicial precedent.[23]

[19] ***Local Franchising NPRM,*** ¶1 ("potential competitors seeking to enter the multichannel video programming distributor ("MVPD) marketplace have alleged that in many areas the current operation of the local franchising process serves as a barrier to entry. Accordingly, this ***Notice*** is designed to solicit comment **on** implementation of Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises.")

[20] During the Commission's Agenda Meeting in Keller, Texas, on February '10,2006, one Verizon official identified Montgomery County, Maryland, as an obstinate LFA that was insisting upon unreasonable illegal demand and delaying negotiations. Since that meeting, Verizon has in fact obtained a franchise in Montgomery County. ***See*** Press Release, Montgomery Country, Md., County Negotiates Cable Franchise Agreement with Verizon; Agreement Resolves Litigation, Provides Increased Competition for Cable Service (Sept. 13, 2006) (available at http://www.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=2582). In fact, this ***Order*** blatantly ignores public statements that significantly undermine representations some proponents of this decision have made to the Commission. For example, AT&T has publicly stated that Project Lightspeed will he available to 90% of its "high-value" customers, but to less than ***5%*** of its "low value" neighborhoods, but today the Commission undermines a locality's ability to ensure all residents are served. Leslie Cauley, ***Cable, Phone Companies Duke it out for Customers***, USA Today, May 22, 2005, available at: http://www.usatoday.com/money/media/2005-05-22-telco-tv-cover-usat_x.htm?csp=34 (last viewed 12120106). As Verizon's CEO of one major new entrant recently noted, "Any place it's come to a vote, we win." Dionne Searcey, ***As Verizon Enters Cable Business, It Faces Local Static Telecom Giant Gets Demands As It Negotiates TV Deals,*** Wall St. **J.**, Oct. **28,** 2005, at A1. Yet in today's ***Order,*** the Commission somehow determines that there is widespread bad faith only **on** the part of the LFAs, not the new entrants, in order to justify this sweeping federal preemption.

[21] **47** U.S.C. §541(a)(1).

[22] Admittedly, however, read together, sections 621(a)(1) and 635(a), clearly vest the courts, not the FCC, with exclusive jurisdiction over the determination of what constitutes "unreasonably refuse." In light of the fact that these two provisions were amended simultaneously in 1992, this is the only rational interpretation. As NATOA pointed out in its Comments, "[i]t is ludicrous to suggest that Congress, having provided that only "final" decisions

(continued...)

While the Commission purports to limit its action today to interpreting "unreasonably refuse," the ***Order*** stretches section 621 well beyond the meaning that the statute can bear and, consequentially, changes the franchising process in fundamental ways. There are certain salient features of today's ***Order*** that raise serious legal and policy implications, requiring careful scrutiny. Most notably, the ***Order:*** (1) imposes a 90-day shot clock on LFAs to render a decision on the franchise application of a competitive applicant with existing rights-of-way; (2) deems a competitive entrant's franchise application granted after 90-days; **(3)** prohibits the denial of a competitive entrant's application based upon the entrant's refusal to comply with any build-out obligations; **(4)** prohibits the denial of a competitive entrant's application based upon the entrant's refusal to build and support PEG and I-net; and ***(5)*** authorizes a new entrant to refrain from obtaining a franchise when it is upgrading "mixed use" facilities that will be used for the delivery of video content.

The ***Order*** finds that franchising negotiations that extend beyond the time frames created today by the Commission amount to an unreasonable refusal to award a competitive franchise within the meaning of 621(a)(1). This finding ignores the plain reading of the first sentence of section 621(a)(1), which provides that a franchising authority "may not ***unreasonably refuse to award*** an additional competitive franchise."[24] On its face, Section **621(a)(1)** does not impose a time limitation on an LFA's authority to consider, award, or deny a competitive franchise. The second and final sentence of section 621(a)(1) provides judicial relief, with no Commission involvement contemplated, when the competitive franchise has been "denied by ***a final decision*** of the franchising **authority**."[25] There is no ambiguity here: Congress simply did not impose a time limit on franchise negotiations, as it did on other parts of Title VI (see discussion ***infra).*** Hence, whether you read the first sentence alone or in context of the entire statutory provision or title, its plain and unambiguous meaning is contrary to the Commission's interpretation. Section **621(a)(1)** provides an expressed limitation on the ***nature***, not the timing, of the refusal to award a competitive **franchise**.[26]

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of the "denial" of a franchise application may be appealed, somehow intended, ***sub silentio***, to have its own language gutted by allowing parties to bypass the last sentence of § 621(a)(1) entirely and go directly to the FCC." NATOA Comments at 28.

[23] The Senate Report of the 1992 Cable Act concluded that, "[b]ased on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be ***encouraged [not required]*** to award second franchises. Accordingly, [the 1992 Cable Act,] as reported, prohibits local franchising authorities 60m unreasonably refusing to grant second franchises." S. Rep. No. 102-92, at **47** (1991)(emphasis supplied). Thus, an LFA's decision to not grant a franchise need only not be unreasonable.

As one federal district court observed:

> The House version contained a specific list of "reasonable" grounds for denial. H. R. Conf. Rep. No. 102-862, at 168-69 (1992). The Senate version, on the other hand, listed "technically infeasible" and left other reasonable grounds undefmed. By choosing not to adopt a federally mandated list of reasonable grounds for denial in favor of an open-ended definition, ***Congress intended to leave states with the power to determine the bases for granting or denying franchises, with the only caveat being that a denial must be "reasonable."***

*Knology, Inc. v.* ***Insight*** *Communications* Co, *L.P.*, 2001 WL 1750839 at * 2 **(W.D.** Ky. March 20, 2001) (citation omitted) (emphasis supplied).

[24] 47 U.S.C. §541(a)(1) (emphasis added).

[25] *Id* (emphasis added).

[26] Congressional intent to qualify the nature **of** an LFA's refusal, __not__ the timing of the refusal, is clear when you consider another provision **of** Section 621(a). Section 621(a)(4)(A) provides that "franchising authority shall allow (continued...)

Even if 1 were able to move beyond this ***Order's*** facially defective reading of 621(a)(1), the Commission's selection of 90 days as the only reasonable time frame for an LFA to consider the franchise application of a competitive provider that already has rights-of-way access before it is "deemed granted is demonstrably inconsistent with the overall framework of Title VI, unsupported by the record evidence, and quite arbitrary.

The franchising framework established in Title VI does not support the Commission's decision to select 90 days as the deadline for a default grant – another Commission creation – to become effective?' Throughout **Part** III (Franchising and Regulation) of Title VI, when Congress specifically decided to impose a deadline for **LFAs** to consider sales of cable systems, modification of franchise obligations, and renewals of existing franchises, in all three instances, Congress chose 120 **days.**[28] In other sections of the Act, the prevalent time frame Congress imposed on LFAs and the Commission is 180 **days.**[29] Today, the Commission, without authority, cannot take the place of Congress and impose a tighter time frame than Congress ever contemplated to impose on LFAs in the franchising process. This is well beyond Commission "line-drawing'' authority, which requires the Commission to operate within the established framework of the authorizing legislation.

While a 90-day deadline arguably could be considered "reasonable," that is not the statutory standard the Commission is purporting to use as the basis of its authority. We can only define ***"unreasonable"*** refusal,[30] which could be "foot-dragging'' or "stonewalling" that amounts to a ***defacto*** denial of a franchise application. This is not the same as establishing an arbitrary, inflexible 90-day time frame, which overlooks the fact that 120 or 180 days may be reasonable under certain circumstances. While the Commission bas line-drawing authority in some cases, the position taken in the ***Order*** is untenable on its face, given that Congress set a 120-day deadline for franchise transfers, which tend to be simpler than awarding new franchises, unless one is willing to assert that Congress itself was unreasonable. The aggressive schedule set here, while understandable and even desirable from a policy perspective, is evidence of the legislative nature of the ***Order.***

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the applicant's cable system ***a reasonable period of time*** to become capable of providing cable service to all households in the franchise area." In that case, Congress explicitly qualified timing, not the scope of buildout. **As** demonstrated in the Order, the Commission's attempt to super-inflate the meaning of "unreasonably refuse" in 621(a)(1), and diminish the significance of "unreasonable period of time" in section 621(a)(4)(A) is transparently inconsistent and blatantly self-serving.

[27] The ***Order*** imposes a time limit of **90** days on LFAs to decide franchise applications from entities that already have access to public rights-of-way and a time limit of ***six*** months for applicants that are not already authorized to occupy the rights-of-way. Such a distinction does not exist in Title 6, notwithstanding the fact that Congress specifically contemplated phone companies – entities that already have access to public rights-of-way – obtaining franchises to provide video service.

[28] 47 U.S.C. § 537 (providing LFAs 120 days to act upon request for approval of sale or transfer on cable systems); **47** U.S.C. § **545** (providing LFAs 120 days to modify franchise obligations); and 47 U.S.C. § 546 (providing LFAs a "4-month period" to "renew the franchise **or,** issue a preliminary assessment that the franchise should not be renewed").

[29] ***See.*** *e.g.*, **47** U.S.C. § 543 (authorizing the Commission to "ensure that the rates for the basic service tier are reasonable" and requiring the Commission to develop regulations in 180 days).

[30] 47 U.S.C. § 541(a)(1). Today's ***Order*** specifically adopts rules that prohibit franchising authorities from ***"unreasonably*** refusing'' to award competitive franchises. ***Order*** at ¶ 1.

To make matters worse, the Commission-created 90-day shot clock seems to function more like a waiting period, during which time the new entrant has little incentive to engage in meaningful negotiations. An objective review of the evidence shows that there is sufficient blame on both sides of the negotiation table. Sometimes, there are good reasons for delay; and at other times, one side might stall to gain leverage." While the majority is certainly aware of these tactics, they fail to even mention the need for **LFAs** and new entrants to abide by, or **so** much as to have, reciprocal good faith negotiation obligations. The majority also has ignored the apparent need to develop a complaint or grievance mechanism for the parties to ensure compliance. Perhaps Congress might consider imposing on the Commission a binding deadline to resolve complaints, which would inject an incentive for both sides to negotiate, meaningfully and in good faith?'

Without anything other than the asserted authority to interpret "unreasonably refuse," the Commission creates a regulatory reprimand for an LFA's failure to render a final decision within the Commission-created time limits. The consequences of the failure to reach agreement within 90 days is that the LFA will be deemed to have granted the competitive entrant an interim franchise based on the terms proposed in the entrant's franchise application. In practicality, this will confer rights-of-way access over local property. In selecting this remedy, the Commission purportedly "seeks to provide a meaningful incentive for local franchising authority to abide by the deadlines contained in the *Order*."[33] While the policy goal is understandable and arguably consistent with congressional intent to encourage the award of competitive cable franchises, we do not have legal authority to establish punitive, one-sided consequences, in order to create an "incentive." Moreover, the Commission ignores that by establishing a default grant of franchise applications effectively confers local property rights unilaterally and without regard for inherent local police powers and public health, safety and welfare.

The Commission cites no credible authority that empowers it to deem a new entrant's franchise application granted by the **LFA** and thus confer local property rights." When construing a statute, principles of construction caution against any interpretation that may contravene existing law or **U.S.** Constitution. In this case, **I** am wary of a federal agency, which purports not to preempt any state-based

[31] As the July 11, 2006, filing of the Greater Metro Telecommunications Consortium, the Rainer Communications Commission and the City of Tacoma, Washington explained "[I]t is an oversimplification to believe that competitive entry into video programming can be facilitated by requiring a local government to act on a franchise application within a specific period of time. What the Commission may consider a delay is often a reasonable time for consideration, and indeed, the internal bureaucracies within many large companies often times dwarf the internal processes within local government, *so* that any rule the Commission might deem appropriate to apply regarding time to respond, must also be imposed upon the other party to negotiations."

[32] The Commission purposefully stops short of creating reciprocal good faith obligations because that would authorize the parties to file a complaint with the Commission when negotiations fall apart. Such a complaint process would effectively serve as an enforcement mechanism, which would only increase this ***Order's*** litigation exposure as quasi-legislative document. Nevertheless, today's ***Order*** cannot be reasonably viewed as mere guidance to LFAs or a clarification of the term "unreasonably refuse" in section 621(a)(1). There is a real, punitive consequence if the LFA does not follow the Commission's dictates – a "deemed granted" franchise, which incurably alters the dynamics of franchise negotiations.

[33] ***Order*** at ¶ 16

[34] The Commission's reliance on ancillary authority it exercised in the early 1970s, well before congressional enactments in 1984, 1992 and 1996, is unavailing. In fact, such reliance reveals the Commission's need to make too large a reach to justify it actions. ***See*** Letter from James L. Casserly, Counsel for Comcast Corporation, to Marlene Dortch, Federal Communications Commission, MB Docket No. 05-311 (filed December 13,2006).

franchising law, but yet is prepared to step into the shoes of an LFA – an instrumentality of the state – to grant a franchise application with all the attendant rights-of-way privileges.[35]

The Commission rejected an approach that would have deemed an application "denied once the shot clock expired without LFA action. This approach, I maintain, would have expedited the judicial review that was Congress' chosen remedy, and is infinitely more consistent with the letter and spirit of the Communications Act, Title VI, and specifically sections 621(a)(1) and 635. Nowhere in the Act is the Commission granted the authority to force localities to grant franchises. Simply put, the Commission's "deemed granted" approach in the *Order* is not a justifiable choice to fill the perceived gap left open by Congress when it did not provide a specific remedy against LFA action that is short of an outright denial of a franchise application. While it is generally proper for the Commission to exercise its "predictive judgment," that is only when the Commission has the requisite authority to act within a certain area and it stays within its authority. Neither exists in this case.

In terms of build-out, the Commission seems to make a deliberate effort to overlook the plain meaning of the statute and to substitute its policy judgment for that of Congress. The Commission concludes that it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of an applicants' refusal to agree to any build-out obligations. The Commission's analysis in this regard is anemic and facially inadequate.

Section 621(a)(4)(A) provides that "[i]n awarding a franchise ***the franchising authority*** shall allow the applicant's cable system a ***reasonable period of rime*** to become capable of providing cable service to all households in the franchise area." Absent express statutory authority, the Commission cannot declare it unreasonable for LFAs to require build-out to all households in the franchise area over a reasonable period of time. The Commission's argument in this regard is particularly spurious in light of the stated objective of this ***Order*** to promote broadband deployment and our common goal of promoting affordable broadband to all Americans. In the end, this is less about fiber to the home and more about fiber to the McMansion.

The Commission is correct on one point, that section 621(a)(4)(A) is actually a limitation on LFA authority. However, consistent with plain reading of the provision and its legislative history, Section 621(a)(4)(A) surely is not a grant of authority to the Commission and does not impose a limitation on the ***scope*** of a competitive provider's build-out obligations. Indeed, section 621(a)(4)(A) explicitly limits the "period of time" to build-out, but an LFA is unrestrained to impose full, partial, or no build-out obligations on all cable service providers. As long as an LFA gives a competitive provider "a reasonable period of time to become capable of providing cable service to all households in the franchise area," section 621(a)(4)(A) essentially shields build-out requirement from constituting an "unreasonable refusal" to grant a competitive franchise. While this policy could be changed by Congress to facilitate competitive entry, that is not the current state of the law. ***An*** LFA cannot be prohibited from requiring build-out to all households in the franchise area if an LFA allows "a reasonable period of time" to do so. The Commission has not been ordained with a legislative "blue pencil" to rewrite law. Congress specifically directed LFAs – not the FCC – to allow a reasonable period of time for build-out. As much as the Commission would like it be its role, Congress gave the role to LFAs, and it is Congress' purview to modify that explicit delegation of authority.

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[35] *See g[illegible]ly*, Charter Communications v. County of Santa [illegible], 304 F.3d 927 ([illegible] Cir. 2002) (holding that deferenc[illegible] is a[illegible]cc[illegible]rded to legislative action of local go[illegible]ernment). [illegible] in light of fact that the Commission does not have clear [illegible] [illegible]ity in this case; and local reg[illegible] in this case, are likely [illegible] sanctioned by the Cable Act and consistent with the express provisions of the Act, *see* 47 U.S.C. § 556(a).

Assuredly, Section 621(a)(4)(A) does not impose "universal" or "uniform" build-out requirements on franchise applicants. This may be a reflection of congressional intent to focus on the needs of the locality.[36] However, it does not prohibit LFAs from requiring build-out obligations as a condition of franchise approval, so long as the competitive applicant is given a reasonable period of time.

The rapid deployment of broadband has been a goal of mine since I joined this Commission. Wireline competition in the video market, particularly, is critical as a means to constrain prices, which in itself is a worthy goal after year upon year of price hikes. It is also critical to the future of our democracy that Americans have access to as many forms of video content as possible so they can make up their own minds about the issues of the day and not remain subject to a limited number of gatekeepers who decide what deserves airing based on their own financial or ideological interests. But, in order for the Commission to promote these goals effectively, we must operate within our legal authority.

Perhaps the majority has failed to consider the real life consequences of today's Order. For instance, in New York City, competitive entrants could file the Commission-mandated informational filing that proposes to serve only Broadway, Madison, or Park Avenue. Under today's Order, the New York City franchising authority would be forbidden from denying the competitive franchise based solely on the fact that the new entrant refuses to certain build-out requirements. The LFA is placed in the difficult position of either denying outright the franchise and absorb the *costs* and fees for the ensuing litigation, or agree to a franchise that is not responsive to needs and interests of local community.

How can the majority declare build-out to be an impediment to entry when one of the major incumbent phone companies, AT&T, claims that it does not need a franchise to operate its video service, and the other, Verizon, has agreed to different, but favorable, build-out obligations with various states and localities? Under the federalist scheme of the Act, different jurisdictions can choose models that best suit their specific **needs.** For example, in New Jersey, the state-wide franchise reform law correlates build-out principally to population density, while build-out obligations in Virginia principally track the entrant's existing wireline facilities. And in New York City, Verizon and the LFA were actively negotiating universal build-out over a period of a few years.

The broad pen with which the majority writes today's Order does not stop with build-out. The Order also uses the Commission's alleged authority under Section 621(a)(1) to determine that any LFA refusal to award a competitive franchise because of a new entrant's refusal to support PEG or I-Net is *per se* unreasonable. Although the Order purports to provide clarification with respect to which franchise fees are permissible under the Act, it muddles the regime and leaves communities and new entrants with conflicting views about funding PEG and I-Net. Indeed, Congress provided explicit direction on what constitutes or does not constitute a franchise fee, with a remedy to the courts for aggrieved parties.

Today's Order should make clear that, while any requests made by an LFA unrelated to the provision of cable service *and* unrelated to PEG or I-NET are subject to the statutory five percent franchise fee cap, these are not the type of costs excluded from the term "franchise fee" by section 622(g)(2)(C). That provision excludes from the term "franchise fee" any "capital costs that are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities." The legislative history of the 1984 Cable Act clearly indicates that "any franchise requirement for the provision of services, facilities or equipment is not included as a 'fee.'"[37]

[36] ***See*** **47** U.S.C. § 521 (2)(stating that the one of the central purposes of Title 6 is to "assure that cable systems are responsive to the needs and interests of the local community.") ***See also*** **47** U.S.C. § 521(3)(stating that another central purpose of Title 6 is to establish clear federal, state and local roles).

[37] The legislative history of 1984 Cable Act provides "in general, [section 622(g)(2)(C)] defines as a franchise fee only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirement **for**

(continued...)

PEG facilities and access provide an important resource to thousands of communities across this country. Equally important, redundancy or even duplicative I-Net provides invaluable homeland security and public health, safety and welfare functions in towns, cities, and municipalities across America. It is my hope that today's decision does not undermine these and other important community media resource needs.

While my objections to today's ***Order*** are numerous and substantial, that should not overlook the real need I believe there is for franchise reform. Indeed, there is bipartisan support for reform in Congress, and most LFAs throughout this country are committed to bring video competition to their jurisdictions. My fundamental concern with this ***Order*** is that it is based on such paper-thin jurisdiction, but it is truly broad in scope. It ignores the plain reading **of** the section **621,** usurps congressional prerogative and pre-empts LFAs in certain important respects that directly contradict the Act.

The **sum** total here is an arrogant case of federal power riding roughshod over local governments. It turns federalism on its head. While I can support certain efforts to streamline the process and preclude local authorities **from** engaging in unreasonable practices, this item blatantly and unnecessarily tempts the federal courts to overturn this clearly excessive exercise of the limited role afforded to us by the law. The likely outcome of being reversed in Federal Court could have pernicious and unintended consequences in limiting our flexibility to exercise our discretion in future **worthy** endeavors.

Accordingly, I dissent

(Continued from previous page)
the provision of services, facilities or equipment. **As** regards PEG access in new franchises, payments for capital costs required by the franchise to be made by the franchise to be made by the cable operator are not defined as fees under this provision." H.R. REP. No. **98-934,** at ***65*** reprinted in **1984** U.S.C.C.A.N.4702.

**STATEMENT OF**
COMMISSIONER **DEBORAH TAYLOR TATE**

***Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended** by **the Cable Television Consumer Protection and Competition Act of1992 (MB Docket No. 05-311)***

Today's item, like most we address as an expert agency, is full of sophisticated technical, legal, and policy arguments. At a high level, however, I view this as a continuation down a path of deregulatory policies designed to encourage new market entry, innovation, and investment. Indeed, "encourag[ing] more robust competition in the video marketplace" by limiting franchising requirements has long been a stated goal of the Commission as well as a driving force behind statutory terms we interpret today.

Section 621(a)(1) of the Communications Act of 1934, as amended (the "Act"), states that franchising authorities ("LFAs") may not "unreasonably refuse to award" a competitive franchise to provide cable services. I agree with our conclusion that we have the jurisdictional authority to interpret this section of the Act and adopt rules to implement it. In amending Section 621(a)(1) to include the phrase "unreasonably refuse to award," Congress explicitly limited the authority of LFAs. However, if an LFA does not make a final decision for months on end, or perhaps even years as the record indicates, new entrants are given no recourse. Also, unreasonable demands, similar to long delays, serve as a further barrier to competitive entry. It is nonsensical to contend that, despite the limitation on LFA authority in the Act, LFAs remain the sole arbiters of whether their actions in the franchise approval process are reasonable. Since the section's judicial review provision applies only to final decisions by LFAs, absent Commission action to identify "unreasonable" terms and conditions, franchise applicants would have no avenue for redress. I conclude that our broad and well-recognized authority as the federal agency responsible for administering the Act, including Title VI, permits us to identify such terms and conditions, and I support our exercise of that authority.

As with most orders, we explored numerous ways to achieve our goals. I ultimately support today's item, because I believe that, by streamlining timeframes for action and providing practical guidelines for both LFAs and new entrants, the item encourages the development of competition in the video marketplace and speeds the deployment of broadband across the country in a platform-neutral manner. These beneficial policy results should not be underestimated. Our annual reports to Congress on cable prices, including the report we adopt today, consistently show that prices are lower where wireline competition is present. And, of course, broadband deployment enhances our ability to educate our children for the jobs of tomorrow and ensures that the United States remains competitive in this global communications age.

Additionally, I am pleased that we recognize – and do not preempt – the actions of those states that have reformed their franchise rules. Their efforts to streamline the process for competitive entry are laudable.

Finally, it is critical that as we advance pro-competitive policies, we ensure that our policies do not unreasonably create asymmetry in the marketplace. Accordingly, I am encouraged that we resolve to address open issues regarding existing franchise agreements on an expedited basis. I encourage all interested parties to use your energies toward assisting us as we seek a way to apply more broadly our conclusions across all companies.

**STATEMENT OF**
COMMISSIONER **ROBERT** M. MCDOWELL

*Re: In the matter of: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)*

I have long advocated the Commission doing all that it can to open new opportunities for entrepreneurs to have the freedom to construct new delivery platforms for innovative new services. More delivery platforms mean more competition. More competition means consumers can choose among more innovative offerings. As consumers become more empowered, prices fall and, as a result, new technologies become more available to help improve the lives of all Americans. In short, creating a de-regulatory environment where competition is given the chance to flourish kicks off a virtuous cycle of hope, investment, growth and opportunity.

Today, the Commission is taking a step forward in what I hope will be a noble quest to spur more competition ***across*** many delivery platforms and, where appropriate, ***within*** delivery platforms. While we already have some competition in the video market, American consumers are demanding even more competition. And that's the goal of our action today: more competition through de-regulation. Perhaps President Ronald Reagan foresaw an issue like this one when he said, "We have a healthy skepticism of government, checking its excesses at the same time we're willing to harness its energy when it helps improve the lives of our citizens." That is precisely what we are doing today: checking any government excesses at the local level to unleash free markets which will help improve the lives of all Americans.

This order strikes a careful balance between establishing a de-regulatory national framework to clear unnecessary regulatory underbrush, while also preserving local control over local issues. It guards against localities making unreasonable demands of new entrants, while still allowing those same localities to be able to protect important local interests through meaningful negotiations with aspiring video service providers. Local franchising authorities are still free to deny deficient applications on their own schedule, but we are imposing a "shot clock" to guard against unreasonable delay. After the shot clock runs out, if the locality has not granted or denied the application, an interim or temporary authority will be granted to give the parties more time to reach a consensus. If the LFA feels as though it cannot grant a franchise during this period, they are free to deny the application. And unhappy applicants still have the liberty to go to court, as codified under federal law.

Additionally, should communications companies decide to upgrade their existing non-cable services networks, localities may not require them to obtain a franchise. However, this order does not address whether video service providers can avoid local or federal jurisdiction over those video services because those services are carried over differing protocols, such as Internet protocol. That question is explicitly left for another docket.

In the same spirit of deference to localities, we are not pre-empting recently enacted state laws that make it easier for new video service providers to enter the market. Those important frameworks will remain intact. Similarly, on the important issue of build-out requirements, we preserve local flexibility to implement important public policy objectives, but we don't allow localities to require new entrants to serve everybody before they serve anybody.

Many commenting parties, Members of Congress, and two of my distinguished colleagues, have legitimately raised questions regarding the Commission's authority to implement many of these initiatives. I have raised similar questions. However, as the draft of this item has evolved and, I think, improved, my concerns have been assuaged, for the most part. The Commission has ample general and specific authority to issue these rules under several sections including, but not limited to, sections: **151, 201,** 706, **621, 622,** and many others. Furthermore, a careful reading of applicable case law shows that the courts have consistently given the Commission broad discretion in this arena. While **I** understand the concerns of others, after additional study, I feel as though we are now on safe legal ground. But I know that reasonable minds will differ on this point and that appellate lawyers are already on their way to the court house. That is the American way, I suppose.

This order is not perfect. If it were, it would say that all of the de-regulatory benefits we are providing to new entrants we are also providing to **all** video providers, be they incumbent cable providers, over-builders or others. **I** want to ensure that no governmental entities, including those of us at the FCC, have any thumb on the scale to give a regulatory advantage to any competitor. But the record in this proceeding does not allow us to create a regulatory parity framework just yet. That's why I am pleased that today's order and further notice contain the tentative conclusion that the relief we are granting to new entrants will apply to ***all*** video service providers once they renew their franchises.

Also, **I** have consistently maintained during my time here that if shot clocks are good for others then they are good for the FCC itself. Accordingly, I am pleased that the Chairman has agreed to release an order as a result of the further notice no later than six months from the release date of this order, and regardless of the appellate posture of this matter. Resolving these important questions soon will give much-needed regulatory certainty to all market players, spark investment speed competition on its way, and make America a stronger player in the global economy. By the same token, it is no secret that **I** would also like to see the Commission act more quickly on petitions filed by any individual or industry group, especially if those petitions may help **spur** competition in any market, he it video, voice, data, wireless, or countless others. We should never let government inaction create market distortions.

I thank my entire staff, especially Cristina Pauzé, for their long hours, dedication and insight regarding this order. **1** also thank the tireless Media Bureau and the General Counsel's office for their tremendous efforts on this important matter. Lastly, I would like to thank Chairman Martin for his strong leadership on this issue.

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

| | |
|---|---|
| **The Villages of Larchmont and Mamaroneck, and the Town of Mamaroneck, New York**<br><br>Petitioners,<br><br>v.<br><br>**United States of America**<br><br>and<br><br>**Federal Communications Commission,**<br><br>Respondents | Case No. ________<br><br>**CERTIFICATE OF SERVICE** |

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused to be delivered as of April **3,2007** via first class U.S. Mail copies of the foregoing Petition for Review and attachments to the attached Service List.

Date April 2, 2007

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Frederick E. Ellrod III

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